Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

ZARY MAREKH, on behalf of herself and others similarly situated,

Petitioner,

v.

EQUIFAX CREDIT INFORMATION SERVICES, INC., TRW, INC. (a/k/a EXPERIAN), and TRANS UNION CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether Congress encroached on States rights, when it acted under its Commerce Clause jurisprudence, and abandoned federalism principles overstepping its legislative bounds in passing the Fair Credit Reporting Act that is at odds with recent Supreme Court case law and is not faithful to the original understanding of that Clause — and is violative of persons Due Process Rights, under their Fifth and Fourteenth, Ninth and Tenth Amendments to hold a property right in their own person.

PARTIES TO THE PROCEEDING

Petitioner is Zary Marekh, on behalf of herself and others similarly situated.

Respondents are Equifax Credit Information Services, Inc., TRW, Inc. (a/k/a Experian) and the Trans Union Corporation.

Since the United States has intervened, the Acting Solicitor General is also being served as a Respondent.

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Appendix A — Summary Order Of The United States Court Of Appeals For The Second Circuit Dated And Filed January 25, 2001 ..... 1a

Appendix B — Memorandum And Order Of The United States District Court For The Eastern District Of New York Dated July 13, 2000 ..... 4a

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Second Circuit Court of Appeals in this case.

OPINIONS BELOW

The Second Circuit opinion (App. A) is reported at 2001 U.S. App. LEXIS 1093 (may be unpublished). The district court opinion (App. B) is reported at (cite full case).

STATEMENT OF JURISDICTION

The judgment of the Second Circuit Court of Appeals was entered on January 21, 2001.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment. Other Constitutional Provisions include U.S. Const., Article I, Section 8, clause 3, the Ninth Amendment and First Amendment. The Statutory Provisions arise under 15 U.S.C. § 1681h(e) (the Fair Credit Reporting Act ("FCRA)).

The Fifth Amendment states in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

The pertinent text of the Ninth Amendment provides:

> The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

The pertinent text of the Tenth Amendment provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The pertinent text of the Fourteenth Amendment provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.

(Emphasis supplied.)

The pertinent text of the Fair Credit Reporting Act ("FCRA") states in pertinent part:

> 15 U.S.C. § 1681h(e) Limitation of liability
>
> Except as provided in sections 1681n and 1681o of this title, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 1681g, 1681h, or 1681m of this title, or based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action, based in whole or in part on the report *except as to false information furnished with malice or willful intent to injure such consumer.*

(Emphasis supplied). 15 U.S.C. § 1681h.

STATEMENT OF THE CASE

On November 6, 1969, Senator Javits and Senator Proxmire discussed a quid pro quo exchange.[1] The exchange consisted of full disclosure on the part of the Credit Reporting Agencies ("CRA's") in exchange for liability protection unless "actual malice" could be proved.[2]

Actual malice was the *Times v. Sullivan*[3] threshold that had to be met before a plaintiff could prove defamation in an action. During the discussion between Senator Javits and Senator Proxmire there was no mention as to whether or not a fundamental right was under consideration.

Petitioner, Zary Marekh (pronounced Zary Marrooch) was 38 years of age at the time this action was instituted. A native of Afghanistan, Ms. Marekh entered the United States in 1979. Beginning as a cashier in a fried chicken restaurant, Ms. Marekh went to school during the day and worked in the evening, earning two diplomas. One a degree from beauty school and one a degree from a computer school. In 1996 Ms. Marekh purchased a restaurant in Astoria, New York.

Ms. Marekh until a few years ago had always had a good credit rating.

In 1996 and 1997, however, Ms. Marekh applied for loans to update her restaurant and to purchase a car. She was denied loans that would have furthered and benefited her business. These were for merchandise, refrigerators and washing machines. Another loan to make restaurant improvements was likewise denied. On further inquiry Petitioner learned that the reason that the loans had not been made had been because the credit reports had stated that she had been delinquent in making her payments. This was not true and was in opposition to the fact that Petitioner had paid bills on time and should have had a good credit standing in the community.

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1. Congressional Record of the 91st Congress, Page 33411.
2. 15 U.S.C. § 1681.
3. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

In 1995 Petitioner reported that her Macy's credit card had been stolen. She notified Macy's of that fact. Nevertheless Macy's either did not make the correction immediately or did make the correction, which was never recorded properly by Trans Union. Macy's charged off $645 as a bad debt. During this time Petitioner made numerous requests of Trans Union to correct her credit report and simultaneously had Macy's write to Trans Union. All of these efforts went unheeded by Trans Union. To this day, Petitioner's credit report has named her as a bad credit risk.

After extensive research, using only violations reported to the FTC, for the six months prior to bringing this action in the district court, the FTC research enumerated many consumer complaints of CRA misconduct.[4] In a separate compilation, the State of Texas alone listed approximately six hundred consumer complaints in the two years prior to the institution of this action. It was on the basis that the Fair Credit Reporting Act ("FCRA") prohibited defamation actions, unless it could be established that actual malice could be proved, that Ms. Marekh brought the present action on behalf of herself and others in the district court and asked that the court find that the Act was unconstitutional. The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 (general federal question jurisdiction), 15 U.S.C. § 1681 (Fair Credit Reporting Act), 18 U.S.C. § 1961 (Racketeer Influenced and

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4. The numbers provided were for the six months, prior to bringing this action, for Equifax, TRW/Experian and Trans Union.

Credit Bureaus	Equifax	TRW/Experian	Trans Union
Consumer Complaints	1143	1163	795
Providing Inaccurate Information FCRA - Violation	598	703	459

Contained in Exhibit B, (with Motion in Opposition to Dismiss at District Court) FTC Report on Equifax, TRW and Trans Union violations, period of October 16, 1997 through April 16, 1998

Corrupt Organizations Act) and under 28 U.S.C. § 1367(a) (supplemental jurisdiction).

The district court had two hearings and entered judgment in favor of defendants. The court of appeals affirmed.

A. The Core Question is whether, even though not directly annunciated within the Fifth or Fourteenth Amendments to the Constitution, a person has Due Process Property Rights within his own person that are as substantial as other possessed property rights that citizen may have.

This case confluences two historical areas of citizen protection under the Constitution and Bill of Rights. One area, considers the Commerce Clause's legislative unconstitutional encroachment on Fundamental Rights contained within the Bill of Rights. A second area considers the common law protection of a person's property right in his or her name, federally (Supreme Court) made defamation laws in light of the First Amendment,[5] the exceptions to *Times v. Sullivan* and a retreat to encompass what was common law for about 200 years prior to *Times v. Sullivan*.[6]

Both protection areas are encompassed by the property that one has within himself as enunciated by John Locke in his "The Second Treatise on Civil Government."

> Though the earth and all inferior creatures be common to all men, yet every man has a "property" in his own "person." This nobody has a right to but himself.[7]

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5. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

6. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 766 (U.S. Vt. 1985) (Justice White concurring) ("This judgment overturning 200 years of libel law was deemed necessary to implement the First Amendment interest in 'uninhibited, robust, and wide-open' debate on public issues.")

7. J. Locke, *Second Treatise of Civil Government*, Of Property, para. 26, p. 20 (Promethius Books ed. 1986). See also, "para. 138 . . . For I have truly no property in that which another can by right take from me when he pleases against my consent." *Id.* at 78.

B. Congress' powers are limited by specific grants of power under the Constitution and restrictions under the Bill of Rights.

The district court erred when it mistakenly believed that Congress could enact laws (FCRA) that deprived citizens of a fundamental right under a rational basis instead of strict scrutiny.

Strict scrutiny should have only been employed because a liberty or property fundamental right was restricted or eliminated. The fundamental right arose under the Fifth Amendment's Due Process[8] Clause contained within the original Bill of Rights, the Fourteenth Amendment's Clause, the Ninth Amendment and Tenth Amendment.

The district court failed to recognize that a person has a property right in his own person. John Locke, *The Second Treatise on Civil Government*. Similarly, there is no difference between a liberty and a property interest. *Lynch, et al. v. Household Finance Corp., et al.*, 405 U.S. 538 (1972); *Dennis v. Higgins*, 498 U.S. 439, 445-46 (1991). Even if the Court would have found that Locke's property right falls outside of the Fifth or Fourteenth Amendment's Due Process Clause, the property right would have nevertheless been implicated under the Ninth Amendment and Tenth Amendment.

Furthermore, it should be noted that the Federalists, such as Hamilton, believed that at the time of the conception of the Constitution, that a Bill of Rights was unnecessary because the Constitution, as it was written was a social contract between a government of all the states (federal) and two other entities. One entity represented by the States and the other entity represented by citizens, with the States as the citizen's agents.

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8. "This court has never attempted to define with precision the words 'due process of law.' . . . It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard." *Holden v. Hardy*, 169 U.S. 366, 389 (1898); *see also Twining v. State of New Jersey*, 211 U.S. 78, 102 (1908).

With most passion, that the federal government would never enact laws under the Supremacy Clause to take from states their rights to care for their citizens Hamilton wrote:

> But it will not follow from this doctrine that acts of the larger society which are *not pursuant* to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such. Hence we perceive that the clause which declares the supremacy of the law of the Union, like the one we have just before considered, only declares a truth which flows immediately and necessarily from the institution of a federal government. It will not I presume, have escaped observation that it *expressly* confines this supremacy to laws made *pursuant to the Constitution*; which I mention merely as an instance of caution in the convention; since that limitation would have been to be understood, though it had not been expressed. (emphasis in the original).

The Federalist No. 33, p. 204-05 (C. Rossiter ed. 1961) (A. Hamilton).

Federalists argued that because the constituted federal government, under the Constitution was a contract, and was a government with specifically granted and limited powers and no more,[9] citizens retained all rights that they had prior to the Constitution. The rights that citizens retained, therefore, were no less and the same rights that they always and previously possessed from whichever state from which they were citizens,

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9. *Marbury v. Madison*, 5 U.S. 137 (1803). *See also The Federalist No. 45*, p. 292 (C. Rossiter ed. 1961) (J. Madison) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.")

the common law and natural law.[10] Justice Marshal reinforced that belief and was unambiguous when he stated in *Marbury v. Madison*,

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?

Id. at 176.

Thus, Federalists concluded that a Bill of Rights was unnecessary. Congress could only legislate within areas specifically designated by the Constitution.[11] Where citizens had natural rights[12] by virtue of no more than being born, and those rights were already protected under state law and the common law, it was seen by some to be superfluous and possibly dangerous[13] to provide a Bill of Rights to protect rights that

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10. *See The Federalist No. 32*, p. 198 (C. Rossiter ed. 1961) (A. Hamilton) ("State governments would clearly all retain all the rights of sovereignty which they before had, and which were, not by that act, *exclusively* delegated to the United States.") (Italics in the original.)

11. Art. I, Sec. 8, cl. 18 expands Congress' mandate to make laws which are "necessary and proper for carrying into Execution" the Constitution's limited law making powers.

12. J. Locke, *Second Treatise of Civil Government*, Of the State of Nature, para. 6, p. 9 (Promethius Books ed. 1986) ("The state of Nature has a law of Nature to govern it, which obliges every one, and reason, which is that law, teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions. . . .")

13. *See The Federalist No. 84*, p. 513 (C. Rossiter ed. 1961) (A. Hamilton) ("I go further and affirm that a bill of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution but would even be dangerous.") It was believed by specifically addressing (enunciating) rights it would lessen other (unenunciated) rights. Madison's cure was the Ninth Amendment.

could not be invaded by the federal government because the government was instituted with specific powers. Besides, the federal government was never intended to carry off those colonial protections that were state protections from the start.[14]

The citizens' protections were that Congress only had power to legislate in areas of limited granted constitutional selection. The power to legislate in areas that had been the province of common law and state law, prior to the Constitution, were never granted to the federal government. Congress could only legislate in selected areas of federal importance.[15]

The central purpose of the formation of the federal government was not to protect rights that citizens had already possessed. It was rather for mutual protection against other union states,[16] to act as a unit against foreign advances, to improve travel between the states and so citizens of any state would be comfortable when they sued or were sued in a central court.

As a further guarantee that there was no assertive implication that could be read into the Constitution by those who would later interpret the Constitution that would reduce the natural rights that citizens enjoyed by virtue of their birth or through God, the Ninth and Tenth Amendments were added to unmistakably reidentify the natural rights retained by the citizens under the proposed Constitution.

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14. *See The Federalist No. 39*, p. 245 (C. Rossiter ed. 1961) (J. Madison) ("[T]he proposed government cannot be considered a national one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several states a residuary and inviolable sovereignty over all other objects.")

15. *See Mistretta v. United States*, 488 U.S. 361, 419 (Scalia, diss.) (1988) (As John Locke put it almost 300 years ago, "[t]he power of the *legislative* being derived from the people by a positive voluntary grant and institution, can be no other, than what the positive grant conveyed. . . ."

16. *See The Federalist No. 5*, p. 53 (C. Rossiter ed. 1961) (J. Jay) ("Considering our distance from Europe, it would be more natural for these confederacies to apprehend danger from one another than from distant nations. . .").

The necessity of repeating the natural rights[17] citizens enjoyed prior to the Constitution within a Bill of Rights appeared redundant. Word for word the Constitution never alluded to the encompassing of *rights* that were to remain subject to state law and the common law. Article VI's Supremacy Clause defined only the supremacy of areas of law by which the federal law and the state law would be in conflict. Under the enumerated laws of the Constitution there was no suggestion that the new government had any interest in usurping the states protection of fundamental rights.

If constitutional ratification depended upon citizens transferring the rights that they held prior to the Constitution under state law to the newly to-be-created federal government, the Constitution would never have been accepted by the conventions' delegates or for that matter, even more important, ratified by the citizens of the colonial states.

Citizens' personal rights, which were never surrendered during the formation of the Constitution, remained and were guaranteed, to this day, by the states.

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17. Certain fundamental liberties, not expressly enumerated in the Constitution or Bill of Rights, are, nonetheless, guaranteed to the individual by the requirement of due process. *See, e.g., Loving v. Virginia*, 388 U.S. 1, 12, 87 S. Ct. 1817, 1824, 18 L. Ed. 2d 1010 (1967) (right to marry); *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (right to privacy in intimate marital relationship); *Aptheker v. Secretary of State*, 378 U.S. 500, 84 S. Ct. 1659, 12 L. Ed. 2d 992 (1964) (right to travel); *Kent v. Dulles*, 357 U.S. 116, 78 S. Ct. 1113, 2 L. Ed. 2d 1204 (1958) (same); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925) (rights to conduct and attend private schools); *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) (rights to teach and learn foreign languages). *Cf. United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4, 58 S. Ct. 778, 783 n.4, 82 L. Ed. 1234 (1938). In order to determine the existence and extent of those rights, not expressly enumerated, that are encompassed in the term "liberty" some source of content for the term must be sought.

C. Proceedings Below.

The decision of the lower court was heavily influenced by its improper conclusion that a person does not have a property right in himself, and thus, no fundamental right. The court held, that "[s]trict scrutiny is only applied in reviewing legislation that affects fundamental rights. . . . The appropriate standard of review of the constitutional issue in this case is the 'rational basis' test, which mandates a reasonable relationship to a legitimate government interest." *See Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-8 (1974).

Remarkable, as well as illustrative, of the court of appeals misinterpretation of the action before it, the Court in its questioning asked Appellant, why *Paul v. Davis*, 424 U.S. 693 (1976) and *Siegert v. Gilley*, 500 U.S. 226, 227 (1991) were not dispositive of Appellant's action. Those two actions, which are very different than the present action, concerned circumstances where it was alleged that *the government* had injured plaintiffs.[18] Plaintiff's Complaint never stated a Section 1983 cause of action.[19]

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18. *Paul v. Davis*, at 694. ("We granted certiorari [ ], in this case to consider whether respondent's charge that petitioners' defamation of him, standing alone and apart from any other governmental action with respect to him, stated a claim for relief under 42 U.S.C. § 1983 and the Fourteenth Amendment.")

Siegert v. Gilley, at 227. ("We granted certiorari in this case to determine whether the United States Court of Appeals for the District of Columbia Circuit properly directed dismissal of petitioner's *Bivens* claim on the grounds that he had not overcome respondent's claim of qualified immunity.")

19. Significantly, *Siegert* permits defamation actions to go forward in state court. Under the FCRA virtually no action can go forward, in any court, because of the "actual malice' standard. Most often the action is removed to federal court, and the Court is asked to dismiss the action under 15 U.S.C. § 1681h(e). ("But so long as such damage flows from injury caused by the defendant to a plaintiff's reputation, it may be recoverable under state tort law but it is not recoverable in a Bivens action.") *Id.* at 234.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE SUPREME COURT.

The court of appeals' holding that there was no merit to Appellant's assertion that the FCRA "enactment exceeds Congress's constitutional authority under the Commerce Clause" cannot be squared with recent Supreme Court Commerce Clause holdings, the Constitution, the Bill of Rights, its Amendments or any supportive document in the Federalist Papers. *See* App. A at 2a.

In a consistent sequence of Supreme Court cases,[20,21,22] this Court has struck down an expansion of legislative limits allegedly carried out by Congress within its Article I powers, and within its Commerce Clause authority. It is undisputed that Congress cannot act under its rational basis authority when confronted by a fundamental right. Under that specific condition — when an enactment will be put forward that will be in direct conflict with a *right* put forth by the founding fathers — that legislative act must be viewed with strict scrutiny. *Kadramas v. Dickinson Public Schools*, 487 U.S. 450, 108 S. Ct. 2481 (1988) ("[A] statute provokes 'strict judicial scrutiny' [whenever] it interferes with a 'fundamental right' or discriminates against a 'suspect class.' ").[23] *See also Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) "the Fourteenth

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20. *United States v. Lopez*, 514 U.S. 549 (1995).

21. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

22. *United States v. Morrison* (*Brzonkala v. Morrison*), 529 U.S. 598 (May 15, 2000).

23. Cited for same proposition by *Kadramas*, *see, e.g.*, *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 16-17, 93 S. Ct. 1278, 1287-88, 36 L. Ed. 2d 16 (1973); *Plyler v. Doe*, 457 U.S. 202, 216-17, 102 S. Ct. 2382, 2394-95, 72 L. Ed. 2d 786 (1982); *Lyng v. Automobile Workers*, 485 U.S. 360, 370, 108 S. Ct. 1184, ____, 99 L. Ed. 2d 380 (1988).

Amendment 'forbids the government to infringe . . . "fundamental" liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.' " (Italics in the original.), *quoting Reno v. Flores*, 507 U.S. 292, 302 (1993).

Fundamental analysis begins with a given: that everyone has a property right in his own person.[24] That assumption was so basic and so obvious to the framers of the Constitution that it went unwritten. Due Process Clause had it roots in Magna Carta,[25] and in its affirmation in Magna Carta of 1354.[26] "No person shall . . . be deprived of life, liberty, or property, without due process of law" was an indispensable part of our Fifth Amendment.

Moreover, should the Fifth or the Fourteenth Amendment be interpreted to not include John Locke's defining the property one has in himself, it would certainly be part of other rights designated by the first nine amendments.

It is within this area of the property that one has in oneself that is in opposition with the Congressional passage of the FCRA, passed only under Congress' rational basis authority.[27] Congress without the support of the Constitution or its attached amendments favored rational basis over strict scrutiny. Congress, indisputably, could have only employed its rational basis authority, *after first*, in error, finding that a person did not have a property right in himself.

Defamation *implies* loss of a property right. A pronouncement by this Court upholding a property right in the sanctity of one's name and protection against defamation would not only be without conflict to any previous decision of this Court but would

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24. *See* n.7.

25. *See* Magna Carta of 1215.

26. *See also* Petition of Right 1628.

27. The lower court believed that FCRA could be enacted under its rational basis authority. *See* App. B, 9a-10a.

simultaneously provide a consistent rationale for findings in defamation actions. For example, protection against defamation is not a fundamental right. The property one has in himself or herself, however, *is* a property right and should be accorded property (or liberty) right status. *See* John Locke. As such the right should be under the protections of the Fifth, Fourteenth, Ninth and Tenth Amendments. Correspondingly, when one is defamed a fundamental right is invoked because the citizen has suffered a property right injury. If for the moment one is willing to overlook FCRA's subversion of due process, and accepts the alleged quid pro quo, there still remains "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *See City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) That citizens are required to surrender their due process rights and right of redress for the opportunity to learn of their defamer is not a proper exchange. There is no "congruence and proportionality" (*id.*) between what the acts demands citizens surrender and the meagerness that is returned to citizens under FCRA. "Justice is the end of government. It is the end of Civil government." *The Federalist Papers No. 51*, p. 324 (J. Madison) (C. Rossiter ed. 1961).

This Court has also discussed defamation actions in terms of liberty infringements; that is "ordered liberty." *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (White, J. concurring) (U.S. Vt. 1985).

> Yet the Court has observed that the individual's right to the protection of his own good name is a basic consideration of our constitutional system, reflecting " 'our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty.' " *Gertz, supra*, at 341, 94 S.Ct., at 3008, *quoting Rosenblatt v. Baer*, 383 U.S. 75, 92, 86

> S.Ct. 669, 679, 15 L.Ed.2d 597 (1966) (Stewart, J., concurring).

Id. at 769.[28]

II. THE COURT OF APPEALS IS AT ODDS WITH RECENT SUPREME COURT DECISIONS LIMITING CONGRESSIONAL EXPANSIVE LEGISLATION UNDER ITS COMMERCE CLAUSE AUTHORITY.

A property right is *always* implicated when the person's character is placed into question. The district court and the court of appeals misapplied how far Congress could extend its Commerce Clause legislative authority to create laws which limit (essentially end) a person's right to compensation for property right takings.

In *United States v. Lopez*, 514 U.S. 549 (1995), United States Supreme Court, Chief Justice Rehnquist criticized the overreaching of the Commerce Clause,

> Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the

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28. While many holdings may be in terms of liberty rights, this Court has found no distinction between property rights and liberty rights. *Lynch et al. v. Household Finance Corp., et al.*, 405 U.S. 538 (1972):

> Such difficulties indicate that the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized. J. Locke, *Of Civil Government* 82-85 (1924); J. Adams, *A Defence of the Constitutions of Government of the United States of America*, in F. Coker, *Democracy, Liberty, and Property* 121-132 (1942); 1 W. Blackstone, Commentaries *138-140.

Id. at 552.

> theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

Id. at 564. Justice Rehnquist, again quoted *Lopez* in *United States v. Morrison* (*Brzonkala v. Morrison*), 529 U.S. 598 (May 15, 2000) at 614. Also see, in *Morrison*,

> But the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. As we stated in *Lopez*, " 'Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.' " *514 U.S. at 557, n. 2 (quoting Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 311, 276-277, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981) (Rehnquist, concurring in judgment)

Similarly, Justice Thomas concurring in *Lopez* held,

> Although I join the majority, I write separately to observe that our case law has drifted far from the original understanding of the Commerce Clause. In a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause.
>
> We have said that Congress may regulate not only "Commerce . . . among the several States," U.S. Const., Art. I, § 8, cl. 3, but also anything that has a "substantial effect" on such commerce. This test, if taken to its logical extreme, would give

> Congress a "police power" over all aspects of American life.

Id. at 584.

Whichever method Congress may legislate, however, it cannot be at the expense of a Fundamental Right. *See also* "*In Jones & Laughlin Steel*, 301 U.S., at 37, 57 S.Ct., at 624, we held that the question of congressional power under the Commerce Clause 'is necessarily one of degree.' " *Lopez* at 566.

A. Reputation is a protected Property Right, under the Due Process Clause.

In *United States v. Lopez*, 514 U.S. 549 (1995), United States Supreme Court, Chief Justice Rehnquist held,

> We start with first principles. The Constitution creates a Federal Government of enumerated powers. *See U.S. Const., Art. I*, S 8. As James Madison wrote, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."[29] *The Federalist No. 45*, pp. 292-293 (C. Rossiter ed. 1961). This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." *Gregory v. Ashcroft*, 501 U.S. 452, 458, 111 S.Ct. 2395, 2400, 115 L.Ed.2d 410 (1991) (internal quotation marks omitted). "Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance

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29. *See also* continuation Madison, ". . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and the properties of the people, and the internal order, improvement, and prosperity of the State." *The Federalist No. 45*, pp. 292-93 (C. Rossiter ed. 1961) (emphasis).

> of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." Ibid.

Id. at 552.

Due Process mandates no less protection for a person's name, than for his home or say, his watch. Petitioners respectfully suggest that there is no difference and that no proprietal distinction may be made of property that is either a home or the value of his name. A man's reputation is a property and due the exact same consideration as any other property (or liberty) right. As a Fundamental Right it may only be judged under "strict scrutiny."

The Lower Court, in its reasoning for its opinion, cited a "quid pro quo.[30]" An exchange of defamation information from the CRA's for the right to only be sued when actual malice occurs. This cannot be perceived as a proper exchange. *See also Lopez* at 562 ("Although as part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce."). It can simultaneously easily be understood from the Congressional Record[31] that the Senators discussing the FCRA never understood that they were discussing or burdening a Fundamental Right.

Justice Kennedy held, as one of the three equal branches of government,

> Congress has vast power but not all power. When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations. Congress must accord States the esteem due to them as joint participants in a federal system, one beginning with

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30. *See* n.1.

31. *See* n.1.

> the premise of sovereignty in both the central Government and the separate States. Congress has ample means to ensure compliance with valid federal laws, but it must respect the sovereignty of the States.

Alden v. Maine, 527 U.S. 706, 758 (1999).

III. ACTUAL MALICE REPRESENTS THE LIMITS AND OUTER PERIMETER OF THE SUPPRESSION OF FUNDAMENTAL RIGHTS.

Senators passing the FCRA in 1969 provided no awareness that they were limiting a fundamental right guaranteed under the Bill of Rights and its subsequent amendments. In permitting defamation actions only whereby actual malice could be demonstrated, Congress virtually eliminated the citizen's fundamental rights given to him on his birth by God or natural rights by virtue of birth alone.

Congress with its 1969 FCRA has put the Act on the same "actual malice" footing as this Court's significant and important holding in *New York Times v. Sullivan* of 1964. In the enactment of FCRA, Congress was oblivious to this Court's careful and studied *New York Times* analysis of the conditions under which First Amendment fundamental rights could be overridden — when necessary in the creation and sustaining of a free government. Nevertheless, in the enactment of FCRA Congress was either unaware or improperly believed that it could through ordinary legislation make *substantive* changes in the Constitution and Bill of Rights. Moreover, it improperly believed that it could override citizens' due process fundamental rights with the same First Amendment "actual malice" analysis that this Court employed in *New York Times*.

With the passage of FCRA Congress overstepped its Article I legislative authority when it encroached on the judiciaries role to say under what conditions a fundamental right could be minimized. Not only did Congress overstep its separation of powers balance with the Judiciary, but it at the same time

usurped powers reserved only to the States under the Constitution and Bill of Rights.[32] Congress transformed itself, from legislative-making within the confines of its Article I powers, to changes that alter the most important structure of our federal and state governments; that is the necessity of checks and balances and of separation of powers.[33] Congress has no power other than that power specifically granted to it. Congress, without doubt, has no power to alter fundamental rights. There is no leeway for improper laws.

It is striking to compare the "actual malice" restraining of First Amendment fundamental rights in *New York Times*:

> We hold that the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct.

Id. at 264.

and,

> The constitutional safeguard, we have said, "was fashioned to assure unfettered interchange of ideas

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32. Under the Constitution and Bill of Rights, citizens' rights remained protected by their states and by natural and common law. The Constitution removed no rights and the Bill of Rights reinforced rights already retained under state law.

33. *See The Federalist Papers No. 51*, pp. 323 (C. Rossiter ed. 1961) ("In the compound republic of America the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself."); *see also id.* at 322 ("where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other — that the private interest of every individual may be a sentinel over the public rights")

> for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484. "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg v. California*, 283 U.S. 359, 369.

Id. at 269.1

compared with

the "actual malice" restraining of due process, under the FCRA's 15 U.S.C. § 1681h(e) Limitation of liability:

> Except as provided in sections 1681n and 1681o of this title, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency . . . *except as to false information furnished with malice or willful intent to injure such consumer.* (Emphasis supplied.)

By any comparison there is no reasonable way to compare the *New York Times* "actual malice" standard, with its important and consistent fundamental right objectives, whereby the Court sought to protect the rights of citizens to criticize government, with, Congress' overreaching objectives that limited liability against CRA's under its rational basis authority.

A. A public issue and a public person. *New York Times*

In a sequence of Supreme Court cases, this Court examined defamation with its relationship to First Amendment principles. Simultaneously, the Court balanced one fundamental right (First Amendment) against another fundamental rights (defamation and associated due process rights). This Court reached the outer

perimeter of suppression of the First Amendment with *New York Times Co. v. Sullivan*. Rights that could be asserted on the basis of "freedom of expression upon public questions is secured by the First Amendment," *id.* at 269, and that "debate on public issues should be uninhibited, robust, and wide-open," *id.* at 270. In an action that focused on a public issue and a public person, the Court held, that "The interest of the public here outweighs the interest of appellant or any other individual." *id.* at 272. The Court held that a public official cannot recover damages for defamatory falsehood unless he proves that the false statement was made with " 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not," *id.* at 280. The Court recognized that it was dealing with an extremely sensitive area that meant suppression of a fundamental right.[34]

This "actual malice" standard of proof, where no lesser degree of culpability will do, has become the linchpin or minimum that a plaintiff must meet in order to find liability against the credit reporting companies.

B. A Public Issue and a Non-Public Person. *Gertz*

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), the Supreme Court the recognized that the fact that expression concerned a public issue did not by itself entitle the libel defendant to the constitutional protections of *New York Times*. The plaintiff, *Gertz*, neither a public official nor a public figure, but was a lawyer tangentially involved in the prosecution. Like every other case in which the Supreme Court found constitutional limits to state defamation laws, *Gertz* involved expression on a matter of undoubted public concern.

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34. *See New York Times* at 264. ("Because of the importance of the constitutional issues involved, we granted the separate petitions for certiorari of the individual petitioners and of the Times.")

C. A Non-Public Issue and a Non-Public Person. *Greenmoss*

In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (U.S. Vt. 1985) the Court returned to the common law, prior to *New York Times*. The credit report was made available to only five subscribers, who, under the terms of the subscription agreement, could not have disseminate it further so Dun & Bradstreet could not have stated that the report involved "strong interest in the free flow of commercial information." The Court held,

> It was speech solely in the individual interest of the speaker and its specific business audience. *Cf. Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 561, 100 S.Ct. 2343, 2348, 65 L.Ed.2d 341 (1980). This particular interest warrants no special protection when — as in this case — the speech is wholly false and clearly damaging to the victim's business reputation. Cf. id. at 566, 100 S.Ct., at 2351; *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-772, 96 S.Ct., 1817, 1830-1831, 48 L.Ed.2d 346 (1976). Id., at 764, 96 S.Ct., at 1827. There is simply no credible argument that this type of credit reporting requires special protection to ensure that "debate on public issues [will] be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. at 270, 84 S.Ct., at 720.

Id. at 762.

In *Greenmoss*, Justice White stated in his (concurring) opinion that *New York Times Co. v. Sullivan*, "[t]his judgment overturning 200 years of libel law was deemed necessary to implement the First Amendment interest in 'uninhibited, robust,

and wide-open' debate on public issues." Justice White's "actual malice" analysis continued,

> As the Court said in *Gertz*: "[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." 418 U.S., at 340, 94 S.Ct., at 3007. Yet in New York Times cases, the public official's complaint will be dismissed unless he alleges and makes out a jury case of a knowing or reckless falsehood. Absent such proof, there will be no jury verdict or judgment of any kind in his favor, even if the challenged publication is admittedly false. The lie will stand, and the public continue to be misinformed about public matters. This will recurringly happen because the putative plaintiff's burden is so exceedingly difficult to satisfy and can be discharged only by expensive litigation. Even if the plaintiff sues, he frequently loses on summary judgment or never gets to the jury because of insufficient proof of malice. If he wins before the jury, verdicts are often overturned by appellate courts for failure to prove malice. Furthermore, when the plaintiff loses, the jury will likely return a general verdict and there will be no judgment that the publication was false, even though it was without foundation in reality. The public is left to conclude that the challenged statement was true after all. Their only chance of being accurately informed is measured by the public official's ability himself to counter the lie, unaided by the courts. That is a decidedly weak reed to depend on for the vindication of First Amendment interests — "it is the rare case where the denial overtakes the original charge. Denials, retractions, and corrections

> are not 'hot' news, and rarely receive the prominence of the original story." *Rosenbloom*, 403 U.S., at 46-47, 91 S.Ct., at 1821 (opinion of BRENNAN, J.); *Gertz*, *supra*, 418 U.S., at 363-364, 94 S.Ct., at 3018-3019 (BRENNAN, J., dissenting).

Id. at 767-70

Justice White's opinion referenced the *Times* decision. As written, the FCRA law mandates that every time a plaintiff is defamed he must endure a *Times v. Sullivan*, defense, even though the common law and Due Process would grant him relief if his name has been besmirched.

Under *Greenmoss*, a disseminator of defamatory facts must be held for libel. To hold the disseminator for libel is not only consistent with this Court but simultaneously consistent with every fundamental right under the Constitution, the Bill of Rights and its further Amendments.

D. Congress, under FCRA, has overridden the Judiciaries role in limiting the "actual malice" to only those instances of free speech necessary to sustain criticism of government, to also substantively include those situations of negligence on the part of CRA's.

In a similar situation, where substantive changes to the Constitution were attempted, the Religious Freedom Restoration Act (RFRA) was held, under *City of Boerne v. Flores*, 521 U.S. 507 (1997), to contradict principles necessary to maintain separation of powers and federal-state balance.[35] The City of Boerne concerned burdens on religion and on the First Amendment. RFRA and the FCRA are similar in that they

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35. In the *City of Boerne*, the issue was whether Congress could through § 5 enforcement power under the Fourteenth Amendment could use that power to alter the fourteenth amendment when it perceived a constitutional violation. *City of Boerne* concerned the Fourteenth Amendment, but Congress' attempt to make substantive changes to the Constitution would apply to all Amendments.

demonstrate Congress' substantive changes and overstepping of its bounds and intrusion on Due Process, the rights of citizens guaranteed under the Constitution and Congress's upsetting the federal-state balance in its the obliteration of citizens' rights under state law.

Acts are passed for its citizens and for their benefit. *M'Culloch v. Maryland*, 17 U.S. 316, 405 (1819).

E. Congress' burdening of a fundamental right, in exchange for a citizens right to view the citizens credit report is unacceptable.

In the *City of Boerne* the Court considered the relationship of the congressional act to what it attempts to promote.

> While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect. History and our case law support drawing the distinction, one apparent from the text of the Amendment.

Id. at 519-20.

There is no "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end," as the FCRA stands. *Id.* The Act instead of enabling the Constitutional protections of United States citizens, lays waste to all areas of due process. The Act, which it must be presumed was written to be constitutionally proper, has instead become substantively improper, encroaching on basic freedoms guaranteed by Constitution.

The power to "legislate generally upon" life, liberty, and property, as opposed to the "power to provide modes of redress" against offensive state action, was "repugnant" to the Constitution. *Civil Rights Cases*, 109 U.S. 3, 15, 3 S. Ct. 18, 24, 27 L. Ed. 835 (1883). *See also United States v. Reese*, 92 U.S. 214, 218, 23 L. Ed. 563 (1875); *United States v. Harris*, 106 U.S. 629, 639, 1 S. Ct. 601, 609-10, 27 L. Ed. 290 (1883); *James v. Bowman*, 190 U.S. 127, 139, 23 S. Ct. 678, 679-80, 47 L. Ed. 979 (1903).

The *City of Boerne* Court continued,

> The design of the Fourteenth Amendment has proved significant also in maintaining the traditional separation of powers between Congress and the Judiciary. The first eight Amendments to the Constitution set forth self-executing prohibitions on governmental action, and this Court has had primary authority to interpret those prohibitions . . . As enacted, the Fourteenth Amendment confers substantive rights against the States which, like the provisions of the Bill of Rights, are self-executing. *Cf. South Carolina v. Katzenbach*, 383 U.S., at 325, 86 S.Ct., at 816-817 (discussing Fifteenth Amendment). The power to interpret the Constitution in a case or controversy remains in the Judiciary.

Id. at 524.

Congress may only enforce a right which it itself already observes.

> If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it." *Marbury v. Madison*, 1 Cranch,

> at 177, 2 L.Ed. 60. Under this approach, it is difficult to conceive of a principle that would limit congressional power. See Van Alstyne, The Failure of the Religious Freedom Restoration Act under Section 5 of the Fourteenth Amendment, 46 Duke L.J. 291, 292-303 (1996). Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V. (emphasis added.)

Id. at 529.

When Congress removed the right to sue for loss of one's good name, and associated property right, it made substantive changes in Due Process under the Constitution and the Bill of Rights; it seized away from the judiciary the prerogative of classifying an injury to a citizen of the United States to which he was entitled to under the Constitution; and, it declassified the State, which originally defined the right taken away and the resulting compensation that arose out of that loss, and altered unconstitutionally the federal-state balance.

"[T]here must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented." *City of Boerne*, at 519-20, *quoting South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). Whatever the good intention of those persons who drafted FCRA in 1970, there is now no relation between the Act's original aim which was to aid and protect citizens and the now finalized result, which has caused and continues to cause grief and personal chaos amongst citizens and simultaneously, for all extensive purposes, prohibits relief.

"Congress' discretion is not unlimited, however, and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution." *Id.* at 536. At issue, is a right so fundamental, as

the protection of one's good name.[36] "Due Process Clause protects . . . some of the interests granted historical protection by the common law of torts (such as the interests in freedom from defamation and malicious prosecution)." *Albright v. Oliver*, 510 U.S. 266, 283, 114 S. Ct. 807, 818, 127 L. Ed. 2d 114, 62 U.S.L.W. 4078 (1994) (*reh'g. den.*) (J. Kennedy *concurring*).

No plaintiff, under FCRA, may successfully bring any defamation claim *unless* he is able to state that Equifax, Trans Union and Experian have acted with "actual malice." Because of that substantive change to the Bill of Rights as a precondition, the requirement of "actual malice" is the functional equivalent of the suppression of a constitutionally guaranteed fundamental right. There is no fairness in such a constitutionally imperfect law and we respectfully ask the Court to find that the Act is unconstitutional.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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36. In Shakespeare's Othello, Iago says to Othello:

> "Good name in man and woman, dear my lord, Is the immediate jewel of their souls. Who steals my purse steals trash; 'Tis something, nothing; 'Twas mine, 'tis his, and has been slave to thousands; But he that filches from me my good name Robs me of that which not enriches him, And makes me poor indeed." Act III, scene 3.

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED JANUARY 25, 2001

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

* * *

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 25th day of January two thousand and one.

PRESENT: Ellsworth Van Graafeiland,
Jon O. Newman,
Pierre N. Leval,

Circuit Judges,

No. 00-6249

ZARY MAREKH, on behalf of herself and others similarly situated,

Plaintiff-Appellant,

v.

EQUIFAX; EXPERIAN, formerly, TRW; TRANS UNION,

Defendants-Appellees,

Appendix A

UNITED STATES OF AMERICA,

Intervenor-Defendant-Appellee.

* * *

Appeal from the United States District Court for the Eastern District of New York (Dearie, *J.*).

Plaintiff Zary Marekh appeals from the dismissal of her constitutional challenges to the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.* In particular, Marekh challenges the constitutionality of 15 U.S.C. § 1681h(e), which limits common law defamation, invasion of privacy, and negligence actions. This section states that a consumer who brings any action or proceeding for defamation, invasion of privacy, or negligence based on information in credit reports needs to prove malice or willful intent to injure on the part of the credit agency in order to recover. Marekh alleges violations of numerous constitutional provisions, including the First Amendment, the Tenth Amendment, and the Due Process Clause, and claims that the enactment exceeds Congress's constitutional authority under the Commerce Clause.

We find no merit in any of Marekh's challenges to the constitutionality of the FCRA. None of her arguments raise a serious question as to the constitutionality of the FCRA, let alone the "plain showing" that is required for us to declare an Act of Congress unconstitutional. *See United States v. Morrison*, 120 S. Ct. 1740, 1748 (2000).

Appendix A

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court be and it hereby is **AFFIRMED**.

FOR THE COURT:
ROSEANN B. MacKECHNIE,
Clerk

s/ Lucille Carr

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED JULY 13, 2000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

97 CV 4517

ZARY MAREKH,

Plaintiff,

– against –

EQUIFAX CREDIT INFORMATION SERVICES, INC., TRW, INC., TRANS UNION CORP.,

Defendants.

MEMORANDUM & ORDER

DEARIE, District Judge.

Zary Marekh brings this action under the Fair Credit Reporting Act (the "FCRA") on behalf of herself and others similarly situated against three credit reporting agencies ("CRAs"), TRW, Inc., Trans Union Corporation and Equifax Credit Information Services. *See* 15 U.S.C.A. §§ 1681, *et seq*. Plaintiff's credit report allegedly contained factual errors that reflected negatively on her credit history. According to the complaint, she was consequently denied business and automobile loans. Plaintiff also pleads a RICO

claim, as well as common law claims of fraud, defamation, negligence, invasion of privacy, unjust enrichment and emotional distress.

Section 1681 of the FCRA requires a plaintiff to demonstrate that a defendant acted with actual malice. Defendant has filed a 12(b)(6) motion to dismiss because plaintiff has not alleged actual malice. Plaintiff has filed a cross-motion challenging the constitutionality of the actual malice standard under the FCRA. Plaintiff argues that consumers possess a constitutional right to sue CRAs and that the "actual malice" requirement unduly infringes that right. Plaintiff claims that the FCRA's requirement that consumers demonstrate actual malice affords these reports the same level of protection as First Amendment speech, even though they relate to private persons in private matters and thus should not be afforded such protection. The United States has intervened in support of the defendants' motion and in opposition to plaintiff's cross-motion.

At a pre-motion conference, plaintiff's counsel acknowledged that if the constitutional claim is rejected, plaintiff's remaining claims, with the possible exception of unjust enrichment, must fail. *See* Transcript of Civil Cause for Pre-Motion Conference, dated February 4, 1998, at 11-12.

Discussion

In considering a motion to dismiss for failure to state a claim upon which relief may be granted under Rule 12(b)(6), the Court must accept the factual allegations in the complaint

as true, *Papasan v. Allain*, 478 U.S. 265, 283 (1986), and construe the allegations in the plaintiff's favor. *La Bounty v. Adler*, 933 F.2d 121,123 (2d Cir.1991).

Plaintiff's Cross-Motion

Plaintiff claims that the FCRA violates the principles of separation of powers because the legislature cannot "compel the courts to adopt a particular construction of a law [and] cannot requir[e] of them a construction of the laws according to its own views." Cross-Motion at 9 (citing Thomas Cooley, *Constitutional Limitations* 94-5 (1868)). According to plaintiff, the FCRA must be struck down to preserve the balance of powers between the courts and Congress. Plaintiff argues that Congress' inroads into the law of defamation through its articulation of an "actual malice" standard is "a hostile takeover of the Judiciary's role as one of the three enumerated powers." *Id.* at 10-11.

Plaintiff then suggests that the FCRA is inconsistent with the enumerated powers requirement and its operation effectively obliterates the Tenth Amendment. *See id.* at 12. Plaintiff maintains that Congress is using the FCRA to re-write the common law of the states, which is a power reserved to the states under the Tenth Amendment. *See id.* at 15. The FCRA places limits on the lawsuits that may be brought and, in so doing, plaintiff maintains that it "skews the balance of power between the legislative powers of Congress and the States [sic] traditional area of protection for its citizens." *Id.* Plaintiff further suggests that the FCRA somehow suspends Due Process in that it preempts rulings of the Supreme Court. Plaintiff describes the right to bring

an action for defamation as a due process right and suggests that the "insurmountable 'actual malice' standard" denies plaintiff his right to bring suits for defamation. Plaintiff points to Supreme Court cases that declined to extend *New York Times Co. v. Sullivan's* actual malice standard to claims of private parties. Specifically, plaintiff cites *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1973) in which the Supreme Court held that the fact that the expression concerned a public issue did not by itself entitle the libel defendant to the constitutional protections of *New York Times* when a non-public person was slandered. *Cross Motion* at 21. Somewhat more germane, plaintiff invokes *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), a case that involved credit reports, for the proposition that when non-public persons and issues are involved, courts may allow defamation suits upon a lesser showing than "actual malice". *Cross-Motion* at 21.

Finally, plaintiff asks the Court to use a strict scrutiny standard in evaluating FCRA's constitutionality. Plaintiff suggests that citizens possess a fundamental right to petition for redress when one's good name has been defamed, and the "actual malice" standard undermines this right. *See id.*, at 28-9.

Tenth Amendment Analysis

Plaintiff even argues that Congress may exercise its constitutional authority to regulate interstate commerce, but only in a manner consistent with existing state law. Long-standing constitutional precedent simply does not support this view. It is well-established that when Congress chooses

to regulate an area of commerce under its interstate commerce power, its legislation preempts state law on the same subject, to the extent that the state law interferes with the achievement of federal objectives. *See Cippollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992); *Gade v. Nat'l. Solid Wastes Mgmt. Assn.*, 505 U.S. 88 (1992).

Defamation

Plaintiff attempts to craft a First Amendment challenge to the actual malice requirement in the FCRA. He argues that *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), stands for the proposition that when non-public persons and issues are involved, courts may allow defamation suits upon a lesser showing than "actual malice". *See Cross-Motion* at 21. Plaintiff argues that a suit under the FCRA involving a private person should thus be allowed upon a lesser showing.

Plaintiff may embrace *Greenmoss* for this proposition, but the case offers no such comfort or support. Although the Supreme Court concluded that "permitting recovery of presumed and punitive damages in defamation cases absent a showing of "actual malice" does not violate the First Amendment when the defamatory statements do not involve matters of public concern," *Greenmoss*, 422 US at 763, the Court surely did not state that "actual malice" is inappropriate, much less unconstitutional, for all private transactions. Thus, while Congress does not require an actual malice standard in private actions, this case cannot be read for the proposition that this heightened standard may not be applied in any private dealings.

Appendix B

Moreover, in developing this argument, plaintiff ignores the focus of *Greenmoss* and subsequent decisions. These cases concern the constitutional right of the speaker or alleged "defamer". They have no conceivable application here where the issue is not whether the CRAs have the right to "speak," but whether a party can recover for their misstatements absent a showing of actual malice.

Separation of Powers

Separation of powers principles only regulate Congress' relationship with other branches of the federal government. They do not affect Congress' power to preempt state common law, as suggested by plaintiff. Although the work load of the federal judiciary might be affected by the FCRA, the constitutional powers with respect to the legislative branch are not.

Strict Scrutiny

Strict scrutiny is only applied in reviewing legislation that affects fundamental rights. Plaintiff revised the fundamental right at issue (she described it earlier as a right to protect one's good name) in a Reply Brief and she bemoaned the diminution of her "right to petition the court with grievances." Although this right is undoubtedly central to the judicial process, it has never been recognized by the Supreme Court as rising to the "fundamental" level that would authorize the application of a strict scrutiny standard.

The appropriate standard of review of the constitutional issue in this case is the "rational basis" test, which mandates

a reasonable relationship to a legitimate government interest. *See Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-8 (1974). Congress has a legitimate interest in regulating businesses such as credit reporting agencies. In enacting the FCRA, Congress advanced this interest by providing consumers with access to the name of any CRA issuing a report on which a decision affecting such consumer's credit is based. However, Congress also recognized that the cost of verifying each credit reported would be prohibitive for CRAs. Thus, Congress resolved that CRAs were not required to verify consumer credit information prior to issuing a consumer credit report. It is now well-settled that credit reporting agencies are not obligated under the FCRA to check the accuracy of information appearing on the reports they generate or issue. *See, e.g., Podell v. Citicorp Diner's Club, Inc.*, 914 F. Supp. 1025, 1032 (S.D.N.Y. 1996) (declining to impose liability simply because credit reporting agencies included inaccurate information in plaintiff's credit report). *See also, Cahlin v. General Motors Acceptance Corp., 936 F.2d 1151, 1156 (11th Cir.1991); Thompson v. San Antonio Retail Merchant's Association, 682 F.2d 509, 513 (5th Cir.1982); Hauser v. Equifax, Inc., 602 F.2d 811, 814-15 (8th Cir.1979)*. Also, Congress recognized that, unless CRAs were afforded some protection, they would face enormous exposure to defamation suits. Thus, a qualified privilege was established by Congress to permit defamation lawsuits only when the CRAs have acted with "actual malice." *See* 15 U.S.C. § 1681(h)(e). This qualified privilege was effectively a "quid pro quo for full disclosure," whereby consumers have full access to their credit information and the CRAs providing such information have some measure of protection. *See* 115 Cong. Rec. 22411 (November 6, 1969). Thus, Congress

increased access to such reports without destroying the incentive necessary to continue providing such reports. *See* Defendants' Consolidated Reply in Support of Their Motion to Dismiss at 3. The requirements imposed upon CRAs and the substantive conditions of recovery by aggrieved individuals through Congress' enactment of the FCRA are reasonably related to legitimate legislative goals.

Further, as developed more fully in the consolidated defense submissions, this qualified privilege is unheard of at common law. Plaintiff's claim to the contrary and his lament about Congress' assault on the common law is simply unsupportable.

Common Law Causes of Action

For the reasons described above, the FCRA does not violate the Constitution. As plaintiff has conceded, if the Court upholds the constitutionality of the FCRA, the other claims must be dismissed. *See* Transcript of Civil Cause for Pre-Motion Conference, dated February 4, 1998, at 11-12.

The Court declines to exercise jurisdiction over remaining state law negligence claims.

RICO and Class Action Claims

Plaintiff's zestful attack on the constitutionality of the FCRA has, unfortunately, led it astray in pleading RICO and class action claims. Although the RICO claim is deficient in many ways, plaintiff concedes that it is at a minimum based on its constitutional argument and must therefore be dismissed once the Court upholds the malice requirement.

Appendix B

The class action claim, based presumably on an assertion of unjust enrichment enjoys, according to plaintiff, a lingering presence. The Court disagrees without hesitation. Count VIII of the Amended Complaint fails to allege the necessary elements of an unjust enrichment claim. Indeed, given the nature of this dispute, it is inconceivable that a plaintiff could satisfy the pleading requirements, alone or as a member of the class. Beyond the obvious and irreparable deficiencies of the unjust enrichment claim, plaintiff barely pays lip service to the requirements of Rule 23 of the Federal Rules of Civil Procedure. Indeed, almost by definition, an individual's claim against a credit reporting agency would of necessity be a highly individualized endeavor, contrary to any notions of particularity with or without a malice requirement.

Conclusion

For the foregoing reasons, defendant's 12(b)(6) motion is granted.

The Clerk of the Court is directed to close this case.

SO ORDERED.

Dated: Brooklyn, New York
July 13, 2000

s/ Raymond J. Dearie
RAYMOND J. DEARIE
United States District Judge